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No. 89-2004

In The

Supreme Court of the United States

October Term, 1989

THOMAS F. KRANTZ,
Petitioner,

vs.

THE STATE OF MONTANA,
Respondent.

On Petition For a Writ of Certiorari
To The Montana Supreme Court

REPLY TO THE BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Arizona Revised Statutes Annotated, Section 13-703(A): Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances.

A. A person guilty of first degree murder as defined in §13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

STATEMENT OF THE CASE

In its statement of the case, the State notes that the Montana Supreme Court found that Petitioner Krantz received actual notice that the use of a weapon would be considered during sentencing, and held that failure to allege weapon use in the Information was harmless error. What it fails to point out, however, is that the Montana Court made the harmless error determination only in the context of considering what notice must be provided a convicted defendant of the issues that will be arise at his sentencing. It specifically held, reaffirming its previous decisions, that the weapon enhancement statute does not create a separate crime or element of a crime. (Pet. App. A at 14a). As a consequence, the Court did not find that the failure to submit the issue of weapon usage to the jury for a factual determination was error, harmless or otherwise.

The State's second assertion, that the Montana Court found that the weapon enhancement statute contained elements "similar to those found in substantive criminal

statutes" but also required elements "not necessary to establish guilt of the underlying crime," is exactly the point of the petition for a writ of certiorari. Petitioner Krantz is asking this Court to decide whether a state may, consistent with the Sixth Amendment and the Due Process Clause of the United States Constitution, impose a separate, consecutive term of incarceration—ten years in this case—based solely upon a factor not charged or submitted to the jury for a factual determination.

ARGUMENT

I. Petitioner Krantz Has Standing To Raise The Issues Presented In The Petition, And They Are Ripe For Review By This Court.

The State first appears to argue that Petitioner Krantz may not have standing because the Montana Supreme Court addressed the standing question in relation to both Montana's weapon enhancement statute and its dangerous offender statute. The State suggests that the Montana Court may have found standing only in regard to the dangerous offender statute. That contention is belied, however, by this statement in the Montana Court's opinion: "The State argues that because the appellant's sentence, including enhancement, did not exceed the maximum possible sentences for robbery and accountability, the appellant suffered no injury. We disagree with the State and hold that the appellant has standing to challenge both the weapon enhancement statute and the dangerous offender statute." (Pet. App. A at 6a). Further, Petitioner Krantz did not raise the issues presented here in relation to the dangerous offender statute; the Montana Court addressed that question sua sponte.

The State next argues that because Petitioner Krantz's total sentence, including enhancement, did not exceed the maximum possible for the two felonies of which he was convicted, Montana has not construed its weapon enhancement provision in a way that conflicts with the

federal constitution, and the issue is not ripe for review by this Court. This argument disregards the fact that the total length of Petitioner Krantz's sentence did not figure, in the least, in the Montana Supreme Court's determination that application of the weapon enhancement statute, absent notice in the charging document and a jury determination on the relevant issue, did not violate the federal constitution.

Any argument that Petitioner Krantz has not been injured by the sentence for weapon enhancement, or that the total length of the sentences actually imposed controls the constitutional issues, is specious. The provisions of the weapon statute itself mandate that the sentence for weapon use must be separate from the sentence for the underlying offense. Section 46-18-221(1) MCA provides: "A person who...while engaged in the commission of an offense...used a dangerous weapon shall, *in addition to the punishment provided for the commission of such offense* be sentenced to a term of imprisonment...of not less than 2 years or more than 10 years." (emphasis supplied). Of even greater significance is §46-18-221(4), which requires the sentence for weapon use to be consecutive to the sentence imposed for the underlying offense. In any case where the weapon statute is invoked it is thus *inevitable* that a defendant will suffer concrete injury above and beyond whatever penalty he suffers for the principal offense.

Also important are the implications of the recidivist portions of the statute. Section 46-18-221(2) provides for increased penalties for subsequent "convictions" for weapon use. It provides:

> A person convicted of a *second or subsequent offense under this section* shall, in addition to the punishment provided for the commission of the present offense, be sentenced to a term of imprisonment in the state prison of not less than 4 years or more than 20 years... (emphasis supplied).

Obviously, this section creates the potential that the

impact of receiving a sentence for weapon use will go beyond the case in which it was imposed.

There are three components of the sentence imposed on Petitioner Krantz: 1) 30 years for robbery, 2) 30 years for accountability for robbery, (these two portions of the sentence to run concurrently) and 3) a *separate, consecutive* sentence of 10 years for the use of a weapon during the offense of robbery.[1] Because the sentence for weapon use is necessarily separate from, and consecutive to, the sentence for the underlying offense, and because adverse collateral consequences may flow from the weapon enhancement sentence, it is reviewable on its own merits. This conclusion is all the more evident if one considers the rule that convictions resulting in concurrent sentences may be challenged independently of each other. *See eg, Benton v. Maryland*, 395 U.S. 784 (1969); *United States v. DeBright*, 730 F.2d 1255 (9th Cir. 1984); *United States v. Burt*, 516 F.2d 873 (7th Cir. 1975); *See, generally*, 3 LaFave and Israel, Criminal Procedure §26.5(b). In those situations, the total sentence to be served is, by definition, within the possible maximum for the offenses of which the defendant was convicted and the liberty interests at stake are far less substantial than in this case.

II. This Court's Precedent, Specifically The Recent Decision In *Walton v. Arizona*, Supports The Position Urged By Petitioner Krantz.

Montana argues that states have absolute power to punish particular acts by designating them either as crimes or as sentencing considerations, and therefore, simply because the Montana Supreme Court has deter-

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[1] As was noted in footnote 6 of the petition for a writ of certiorari, the enhancement pursuant to the weapon statute was itself enhanced by Mr. Krantz's designation as a dangerous offender, which effectively doubles the time he will actually serve in prison under the weapon enhancement portion of his sentence from 2-1/2 to 5 years, less good time (if he receives a parole).

mined that the Montana legislature intended weapon use to be a sentencing consideration, a separate, consecutive sentence for weapon use may constitutionally be imposed, absent an allegation of weapon use in the charging document and a jury determination on that issue.[2] Contrary to the position urged by Montana, however, states do not have absolute power in this regard, otherwise the cases of *Specht v. Patterson*, 386 U.S. 605 (1967) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975) would not have determined that statutes that increase the possible term of incarceration based on separate acts outside the charge, or provide for separate terms of incarceration, cannot be applied absent full trial procedures. The "operation and effect of the law as applied and enforced by the State," rather than merely its formal designation as a sentencing factor, is controlling. *Mullaney*, 421 U.S. at 699.[3]

The State, in it's Brief, attempts to gloss over the differences between Montana's weapon statute and the statute found constitutional in *McMillan v. Pennsylvania*,

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[2] Interestingly, the United States District Court for the District of Montana recently noted that a fair reading of §46-18-221 MCA indicates that the legislature intended weapon use to be treated as a separate offense not a sentencing consideration. (Brief in Opp. App. at 17, footnote 11).

[3] In *Nichols v. McCormick*, No. CV-89-028-BU-PGH (D. Mont. May 4, 1990), the Federal District Court for the District of Montana, like the Montana Supreme Court, concluded that the legislative history of a statute determines its constitutionality under *McMillan*. That decision, like the decision of the Montana Supreme Court, however, fails to give proper effect to the major premise of the decisions in *In re Winship*, 397 U.S. 358 (1970), *Specht*, and *Mullaney:* that there are "obvious" limits beyond which a state may not go in this regard. [Interestingly, in *Nichols*, Judge Hatfield noted his personal agreement with the positions advanced by the petitioner there—and here—but felt constrained by his reading of *McMillan* to uphold the statute, because there was no evidence in it of a recent legislative attempt to reallocate the burdens of proof by redefining traditional crimes. (Brief in Opp. App. at 21, footnote 15)].

477 U.S. 79 (1986) by stating: "The Pennsylvania statute imposed a mandatory minimum period of incarceration, as does Montana's." (Brief in Opp. at 8). This statement is disingenuous in the extreme. The Pennsylvania statute requires the imposition of a mandatory minimum sentence *within* the term already provided for the underlying offense, if the sentencing court finds that a weapon was used. By contrast, the Montana weapon statute mandates the imposition of a *separate, consecutive* two to ten year term of incarceration, that may not be suspended, if the sentencing judge finds that a weapon was used in the underlying offense. The Montana statute imposes a possible loss of liberty on a defendant that automatically extends beyond the maximum possible loss of liberty to which he is subject, based on the crime charged.

The State, in its Brief, also offers the traditional misinterpretation of *Specht v. Patterson*, 386 U.S. 605 (1967) and implies that the case does not stand for the proposition that separate acts giving rise to separate punishments must be charged and proved beyond a reasonable doubt to a jury. That misinterpretation need not detain us.[4] What is important to recognize about *Specht*, however, is that it invalidates the theory that a legislature can only offend the due process clause in this area by redefining traditional crimes in an attempt to reallocate burdens of proof. [5] In *Specht* the legislature had made no such attempt. It had simply—and unconstitutionally—attached additional penalties for uncharged acts to the liability for established crimes, with no requirement that the other acts be charged or proved. *Specht* is thus indistinguishable from this case.

The State also asserts that *Walton v. Arizona*, 110 S.Ct. 3047, 58 U.S.L.W. 4992 (1990), controls the outcome here. That case involved sentencing for first-degree murder, where the sentencing statute provided either for life im-

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[4] It is fully discussed in the Petition at p. 21.

[5] *See*, the discussion of this theory in *Nichols, supra*, footnote 3.

prisonment or the death penalty. The choice between the two possible sentences was guided by a judicial determination, based on evidence presented at a separate sentencing hearing, of the existence of statutorily enumerated aggravating and mitigating factors. This Court rejected Walton's contention that the sentencing scheme was constitutionally infirm because every finding of fact underlying the sentencing decision was not made by the jury.

Walton, however, does not control the issues raised by Petitioner Krantz in his petition for a writ of certiorari—at least not in the sense the state suggests. As noted above, the sentencing scheme considered in *Walton* provided that upon conviction for first-degree murder, a criminal defendant could be sentenced either to life imprisonment or death. Unlike the finding of weapon use in Montana's sentencing scheme, the finding of aggravating circumstances in *Walton* did not permit the imposition of a sentence outside of the range otherwise provided for the offense. This Court relied on that fact in upholding Arizona's sentencing provision, and noted additionally that the finding of a particular aggravating circumstance did not require that the death penalty be imposed, and that the failure to find a particular aggravating circumstance did not preclude the imposition of the death penalty.

Although the *Walton* opinion does not even mention *McMillan*, the statutes at issue in those two cases are analogous because neither adds a separate punishment beyond that provided for the offenses committed, and both guide the trial court in selecting among the sentences already available to it. In fact, in one sense, the Arizona death penalty statute at issue in *Walton* is less restrictive than the weapon statute at issue in *McMillan* because, as noted above, the finding of a particular aggravating circumstance did not mandate the imposition of the death penalty, whereas in *McMillan* the finding of weapon use mandated the imposition of a particular minimum sentence.

Another death penalty case, *Hildwin v. Florida*, 490 U.S. ___ , 105 S.Ct. 2055 (1989), does mention *McMillan*. In

Hildwin, this Court considered Florida's sentencing scheme for first degree murder which, like Arizona's, provided for a sentence of either life imprisonment or death. It was noted that the doctrine enunciated in *McMillan* did not require jury fact-finding under Florida's scheme, because the determination that an aggravating factor existed "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *Hildwin*, 490 U.S. at _, 105 S.Ct. at 2057, *quoting McMillan*, 477 U.S. at 87-88 (1986). Clearly, these very recent decisions support, rather than undermine, the position urged by Petitioner Krantz, that sentencing schemes providing for a separate or additional punishment necessitate greater constitutional protections than schemes that merely dictate the choice of a sentence within the range otherwise provided for the offense.

CONCLUSION

For the reasons presented above, in addition to the reasons presented in the petition itself, certiorari should be granted.

Respectfully Submitted,

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